RECORD AND BRIEFS

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In the Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, ARIZONA, LOUISIANA, MISSISSIPPI, AND WISCONSIN IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Federal law does not directly prohibit sports wagering where it occurs in a State in which it is legal. But the Professional and Amateur Sports Protection Act ("PASPA") makes it unlawful for a State, other than Nevada or several other exempted States, to "license" or "authorize" sports wagering. 28 U.S.C. § 3702. The *en banc* Third Circuit, over two dissents, has interpreted this provision as prohibiting the States from modifying their laws to repeal existing prohibitions on sports wagering.

The question presented is:

Does PASPA's prohibition on States repealing existing laws banning sports wagering commandeer the regulatory authority of the States, in violation of the Tenth Amendment?

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SUMMARY OF ARGUMENT AND INTEREST OF *AMICI CURIAE*

Certiorari is warranted because the Third Circuit's split *en banc* decision below conflicts with two lines of this Court's precedent concerning federal-state relations. In upholding the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq.*, the Third Circuit radically expanded the doctrine of federal preemption by holding that Congress may forbid the States from repealing their existing laws without affirmatively setting forth a federal regulatory or deregulatory scheme. In addition, the Third Circuit disregarded this Court's anti-commandeering jurisprudence by requiring state legislators to maintain, and state executive officials to enforce, laws that would otherwise have been repealed.

Amici curiae are States that submit this brief in support of Petitioners because the Third Circuit's decision fundamentally alters the nature of federal-state relations. The concern of *Amici* States—the States of West Virginia, Arizona, Louisiana, Mississippi, and Wisconsin—is not *what* Congress regulates but *how* it does so. Even where it has Article I authority to act, Congress may not force the States to act as the vehicle for implementing federal policy and thereby shift to the States political accountability for its actions. Such coercion is unconstitutional commandeering and not lawful preemption under the Supremacy Clause. This

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* Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file this brief in support of Petitioners.

coercion also violates a core principle of residual sovereignty protected by the Tenth Amendment—the right of the States to repeal laws and return liberty to the People in areas where Congress has chosen not to regulate.

Importantly, *Amici* States take no position on the wisdom of the state and federal sports wagering laws in this case. Some States may support the expansion of sports betting, while others oppose it. *Amici* States file this brief because they agree that the Third Circuit's decision raises serious federalism concerns for all States.

REASONS FOR GRANTING THE PETITION

This Court has long explained that our system of dual sovereignty limits Congress's ability to directly regulate a State's regulation. It may "encourage a State to regulate in a particular way" by "hold[ing] out incentives to the States as a method of influencing a State's policy choices." *New York v. United States*, 505 U.S. 144, 166 (1992). Moreover, where Congress seeks "to regulate matters directly" through an affirmative federal regime, the Supremacy Clause authorizes "pre-empt[ion] [of] contrary state regulation." *Id.* at 178. But Congress may not simply "regulate state governments' regulation," *id.* at 166, as "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions," *id.* at 162.

The petition should be granted because the Third Circuit has *twice* failed to respect these limits on federal power.

In 2013, a divided Third Circuit panel acknowledged that interpreting PASPA to prohibit States from repealing existing laws would raise "a series of constitutional problems." Pet. App. 160a. But the court purported to avoid those problems by construing PASPA as not "prohibit[ing]" a State from "repealing its ban on sports wagering." *Id.* at 158a, 160a. Rather, the court reasoned, States enjoyed "much room . . . to make their own policy," *id.* at 161a, because they only needed to "enforce the laws they choose to maintain," *id.* at 163a, and avoid affirmative acts such as issuing gambling licenses, *id.* at 158a. Apart from these proscriptions, States

could lawfully allow sports betting simply by removing existing laws from the books. See *id.* at 158a, 161a, 163a.

The State of West Virginia previously explained to this Court that this "affirmative/negative command distinction," *id.* at 37a, 157a, could not withstand scrutiny under well-established anti-commandeering principles. See No. 13-967, Amicus Br. of West Va. *et al.*, at 13–23 (Mar. 17, 2014). Among other reasons, this Court's case law prohibits Congress from using the machinery of state government to carry out federal policy, regardless of the form that state action takes. *Id.* at 14–19. Furthermore, it would often be difficult in practice to distinguish between an impermissible authorization and a permissible repeal. *Id.* at 20–21.

Perhaps recognizing these difficulties, the *en banc* Third Circuit has now rejected as "unnecessary dicta" its prior distinction between a "repeal" and an "authorization." Pet. App. at 23a. But the *en banc* court proceeded to compound the earlier panel's misunderstanding of the Tenth Amendment by further restricting the room in which States have to modify existing legislation on sports wagering.

Over two dissents, including one by the author of the 2013 panel decision, the *en banc* court held that a State's "selective repeal of certain prohibitions amounts to authorization under PASPA." *Ibid.* Despite now interpreting PASPA to prohibit state repeals of existing wagering laws, the court concluded that its view of PASPA's constitutionality "remains unshaken" because States were still afforded "sufficient room under PASPA to craft their

own policies." *Ibid.* Specifically, the court suggested that federal prohibitions on state regulation were lawful so long as they did not subject the States to a "coercive binary choice," that is, require States to "either maintain a complete prohibition on sports wagering or wholly repeal state prohibitions." *Id.* at 17a–18a, 23a. The court declined, however, to "articulate a line" as to what additional state actions other than total repeal of all gaming laws would be permissible under its new reading of PASPA and the Tenth Amendment. *Id.* at 24a.

As shown below, the Third Circuit's decision dramatically departs from this Court's jurisprudence on both preemption and anti-commandeering. *First*, this Court's preemption cases make clear that if Congress enacts an affirmative federal regime, it may also enact an express preemption clause to protect that regime from contrary action by the States. But this Court has never recognized that the Supremacy Clause permits Congress to merely prohibit States from repealing their laws when there is no affirmative federal regime to protect. *Second*, the Third Circuit's decision violates core anti-commandeering principles protected by the Tenth Amendment by prohibiting States from repealing existing law and returning residual sovereignty to the People in areas where Congress has expressly chosen not to legislate.

If permitted to stand, the Third Circuit's decision threatens the constitutional balance of power between States and the federal government. This Court's review is needed to reinforce the proper line

between permissible preemption and impermissible commandeering.

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT CONCERNING FEDERAL-STATE RELATIONS.

A. The Third Circuit's View of Preemption Conflicts With This Court's Case Law.

1. In this Court's cases, the preemption of state law is something that occurs, pursuant to the Supremacy Clause, when necessary to protect the integrity of the federal government's own affirmative efforts to govern directly. As this Court has often explained, it has in its cases found state law preempted in three circumstances. *First*, Congress might "enact[] a statute containing an express preemption provision." *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012). *Second*, "state laws are preempted when they conflict with federal law." *Id.* at 2501. *Third*, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Ibid.* The consistent strand throughout the cases is the existence of valid federal law seeking to govern the country directly. See, *e.g.*, *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981).

In cases of conflict or field preemption, the affirmative federal law is central to the Court's analysis. The question in every one of those cases, after all, is whether the existence of some affirmative federal law *implies* the displacement of a particular

state law. For conflict preemption, this requires close scrutiny of the federal law to determine whether it makes compliance with the challenged state law "'a physical impossibility,'" *Arizona*, 132 S. Ct. at 2501 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)), or whether the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *ibid.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). For field preemption, a court must determine whether the federal law is "so comprehensive[] that it has left no room for supplementary state legislation." *R.J. Reynolds Tobacco Co. v. Durham Cnty., N.C.*, 479 U.S. 130, 140 (1986).

In cases of express preemption, the focus tends instead to be on a specific preemption clause—often a single sentence in a statute—but there is always an overarching affirmative federal law, as well. See, *e.g.*, *Am. Trucking Ass'ns, Inc. v. City of Los Angeles, Ca.*, 133 S. Ct. 2096 (2013) (Federal Aviation Administration Authorization Act of 1994); *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (Federal Employees' Group Life Insurance Act of 1954); *Arizona*, 132 S. Ct. 2492 (Immigration Reform and Control Act of 1986); *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012) (Federal Meat Inspection Act); *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 555 U.S. 285 (2009) (Employee Retirement Income Security Act of 1974); *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431 (2005) (Federal Insecticide, Fungicide, and Rodenticide Act); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (Clean Air Act); *Nixon v. Mo. Mun.*

League, 541 U.S. 125 (2004) (Telecommunications Act); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (Federal Boat Safety Act); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Federal Cigarette Labeling and Advertising Act); *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000) (National Traffic and Motor Vehicle Safety Act); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (Medical Device Amendments to the Federal Food, Drug and Cosmetic Act); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (Airline Deregulation Act); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (Federal Railroad Safety Act); *Aloha Airlines, Inc. v. Dir. of Taxation of Haw.*, 464 U.S. 7 (1983) (Airport and Airway Development Acceleration Act of 1970); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

As this Court has said, an express preemption clause makes explicit what courts infer in finding conflict or field preemption: that certain state laws contravene an affirmative federal regime. See *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (describing an "express preemption clause" as "the best evidence of Congress' preemptive intent" (internal quotations omitted)). Rather than relying on the courts to later discern whether a state law interferes with an affirmative federal law, Congress is permitted by the Supremacy Clause simply to enact "a statute *containing* an express preemption provision" that makes clear which state laws must give way to the new federal regime. *Arizona*, 132 S. Ct. at 2500-01 (emphasis added); see also *Easterwood*, 507 U.S. at 664 (noting that a federal statute may "contain[]" an express preemption clause); *Sprietsma*, 537 U.S. at 62

(same). When added to an affirmative federal law, an express preemption clause serves to protect that federal scheme from state laws that would impose inconsistent rules.

This Court's cases illustrate this use of express preemption clauses not only as part of federal regulatory regimes, but also *deregulatory* regimes. For example, in 1978 Congress enacted the Airline Deregulation Act ("ADA"), which shifted the focus in that industry from complex government regulation to "maximum reliance on competitive market forces." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (internal quotations omitted). And "[t]o ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law relating to rates, routes, or services of any air carrier." *Id.* at 378 79 (internal quotations omitted). Similarly, Congress "deregulated trucking" in 1980. *Rowe v. N.H. Motor Transport Ass'n*, 552 U.S. 364, 368 (2008). Then, in 1994, Congress sought to ensure that the States would not "undo federal deregulation" and thus adopted a law "pre-empt[ing] state trucking regulation." *Ibid.* (internal quotations omitted). In both cases, Congress adopted a federal deregulatory regime and added an express preemption clause to protect that regime by prohibiting action by the States.

All of these cases—whether concerning express, conflict, or field preemption—reflect this Court's description of the Supremacy Clause as a rule of priority between federal and state law. It is, of

course, well known that the Constitution "establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). But "[f]rom the existence of two sovereigns follows the possibility that [state and federal] laws can be in conflict or at cross-purposes." *Arizona*, 132 S. Ct. at 2500. The Supremacy Clause, this Court has explained, "provides a clear rule that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Ibid.* (quoting U.S. Const. art. VI, cl. 2).

2. The Third Circuit's analysis, however, ignores the critical relationship between the preemptive effect of federal law and Congress's affirmative decision to regulate (or deregulate) in an area within its enumerated powers. Rather, the Third Circuit claimed that "congressional action in passing laws in *otherwise pre-emptible fields* has withstood attack in cases where the states were not compelled to enact laws or implement federal statutes or regulatory programs themselves." Pet. App. 19a. In other words, the Third Circuit suggested that, so long as a particular field is "otherwise pre-emptible," Congress may prevent States from acting even if it declines to create a federal regulatory regime itself. See *ibid.*

But the cases that the court relied on in support—*Hodel* and *FERC v. Mississippi*, 456 U.S. 742 (1982)—belie this conclusion. As the court acknowledged, these cases involve the protection of actual federal regulatory schemes. See Pet. App. 19a (noting that *Hodel* involved "a law that imposed

federal standards for coal mining"); *id.* at 20a (noting that *FERC* required states to "'consider' enacting federal standards"). In both those cases, Congress protected the federal regime not by excluding the States, but by permitting them to remain in the field under certain conditions. See *Printz v. United States*, 521 U.S. 898, 925–26 (1997) ("In *Hodel* we . . . concluded that the Surface Mining Control and Reclamation Act of 1977 did not present [a Tenth Amendment] problem . . . because it merely made compliance with federal standards a precondition to continued state regulation. . . ."); *FERC*, 456 U.S. at 765 ("PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards.").

In sum, this Court's cases make clear that if Congress enacts an affirmative federal regime, it may also enact an express preemption clause to protect that regime from contrary action by the States. But this Court has never recognized—as the Third Circuit now has—that the Supremacy Clause endows Congress with the substantive authority to forbid States from acting in "otherwise pre-emptible fields" when there is no affirmative federal regime to protect. See Pet. App. 19a. The Supremacy Clause has been held to give primacy to valid federal laws over contrary state laws, but it has never been construed as a license to Congress to prohibit state lawmaking whenever and however it desires. See *New York*, 505 U.S. at 178 ("The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state

regulation."). This Court should grant certiorari to resolve the conflict between this Court's jurisprudence and the Third Circuit's approach to preemption.

B. The Third Circuit Decision Also Conflicts With This Court's Anti-Commandeering Jurisprudence.

This Court has also made clear that, under the Tenth Amendment to the U.S. Constitution, Congress may not "regulate state governments' regulation." *New York*, 505 U.S. at 166. Yet that is precisely what PASPA does, under the Third Circuit's interpretation: it directly prohibits States (with a few grandfathered exceptions) from repealing bans on sports wagering within their borders.

Just as it radically departed from this Court's preemption case law, the Third Circuit also fundamentally misconstrued this Court's anti-commandeering jurisprudence. The Third Circuit upheld PASPA because, in its view, the statute did not "present[] states with a binary choice—either maintain a complete prohibition on sports wagering or wholly repeal state prohibitions." Pet. App. 17a–18a. The court concluded that Congress still left "sufficient room under PASPA to craft their own policies," even though the court declined to explain exactly what actions, short of a total repeal of all sports wagering laws, would be permissible. *Id.* at 23a.

This Court's test for commandeering, however, does not turn on whether federal legislation leaves the States with something more than a "binary

choice." Rather, as explained below, this Court has made clear that anti-commandeering doctrine exists to ensure that the state and federal governments each remain directly accountable for their own actions. What matters is whether Congress has obscured its own responsibility by forcing state governments to carry out federal policy rather than doing so itself. And that can occur—contrary to the Third Circuit's conclusion—whether or not Congress restricts the States to a "coercive binary choice." *Id.* at 23a.

1. **The Political Accountability Principles At The Core Of This Court's Anti-Commandeering Cases Do Not Accord With The Third Circuit's "Coercive Binary Choice" Test.**

a. This Court has explained that the anti-commandeering doctrine flows directly from the Framers' decision to adopt a structure of dual sovereignty. In drafting the Constitution, the Framers deliberately rejected a system of government in which Congress would "employ state governments as regulatory agencies." *New York*, 505 U.S. at 163. Indeed, that was the model under the Articles of Confederation, and "[t]he inadequacy of th[at] governmental structure was responsible in part for the Constitutional Convention." *Ibid.* At the Convention, two proposals "took center stage," *id.* at 164, and the Framers "explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States," *id.* at 166.

The point of the new governmental structure was to establish dual sovereigns, with each directly

responsible to its citizens for its own actions. The Framers determined that "[t]he new National Government 'must carry its agency to the persons of the citizens. . . . [and] address itself immediately to the hopes and fears of individuals.'" *Id.* at 163 (quoting *The Federalist* No. 16, at 111 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Likewise, "a State's government [would] represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920. The "great innovation of th[e] design" was "'a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Ibid.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

The anti-commandeering doctrine safeguards this system of dual sovereignty and clear accountability. When state and federal governments act separately and directly on their citizens, each is publicly exposed as responsible for its actions, and each must bear the electoral consequences of those actions. If the citizens of a State do not agree with a certain state policy, for example, "they may elect state officials who share their view." *New York*, 505 U.S. at 168. And if that view is contrary to the national view, it "can always be pre-empted under the Supremacy Clause," and then "federal officials [will] suffer the consequences if the decision turns out to be detrimental or unpopular." *Ibid.* But where Congress commandeers and forces States to implement federal policy, "it may be state officials who will bear the brunt of public disapproval, while

the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169.

Accordingly, this Court has stressed that maintaining clear lines of political accountability is the touchstone of the anti-commandeering doctrine. Although commandeering can be a way for Congress to save a few federal dollars, it does not matter whether the States must actually "absorb the costs of implementing a federal program." *Printz*, 521 U.S. at 930. Nor is the importance of the federal program, *New York*, 505 U.S. at 178, or a State's consent, *id.* at 182, relevant. The critical question is whether the federal government has put States "in the position of taking the blame for [the federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930.

As this Court has noted, the focus on maintaining direct accountability "may appear 'formalistic'" but that is the nature of our Constitution, which places great emphasis on "the form of our government." *New York*, 505 U.S. at 187. Our system of dual sovereignty, requiring each government to remain accountable to its citizens, is as much a part of the Constitution as the substantive limits on Congress's power. And it is equally, if not more, significant. The separation of the state and federal governments "is one of the Constitution's structural protections of liberty," *Printz*, 521 U.S. at 921, providing an important "'double security'" against tyranny and the abuse of power, *id.* at 922 (quoting *The Federalist* No. 51, p. 320 (James Madison)). By keeping them strictly apart, "'[t]he

different governments will control each other, at the same time that each will be controlled by itself.'" *Ibid.*

b. The Third Circuit's "coercive binary choice" test fails to recognize that federal laws that prevent States from considering the full panoply of available policy choices—such as whether or not to issue a license—can result in precisely the sort of misplaced blame that the anti-commandeering doctrine aims to prevent. When a State denies an individual his driver's license, building permit, medical license, or fishing license, the individual is unlikely to blame Congress, which did not enact some form of direct national regulation. For the average American, who is not familiar with every nuance of the United States Code, the more obvious culprits are the state officials who stand between the citizen and the desired license.

This human propensity to "shoot the messenger" has long been recognized. Sophocles wrote in *Antigone* that "[n]o one likes the bringer of bad news." Sophocles, *Antigone* (c. 441 B.C.), *reprinted in* Sophocles: *The Complete Plays* 352 (Paul Roche transl., Signet Classics 2001). Shakespeare wrote in *Antony and Cleopatra* that "[t]he nature of bad news infects the teller." William Shakespeare, *Antony and Cleopatra* (c. 1606), *reprinted in The Unabridged William Shakespeare* 1135 (William George Clark & William Aldis Wright eds. 1989). English law historically protected town criers because of the people's tendency to lash out at these bearers of the King's news. Any harm to a town crier—shooting the messenger, so to speak—was considered treason. See

Top town crier to be crowned as Hebden Bridge hits 500, BBC, http://news.bbc.co.uk/local/bradford/hi/people_and_places/arts_and_culture/newsid_8931000/8931369.stm (last updated Aug. 20, 2010).

Importantly, this Court has shown that it does not matter, for purposes of the anti-commandeering doctrine, that a little research might reveal the federal government's involvement. In *Printz*, this Court found that Congress had improperly shifted political accountability to state chief law enforcement officers ("CLEOs") by requiring them to conduct background checks during handgun sales. The Court reasoned: "[I]t will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun." 521 U.S. at 930. Thus, "it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected." *Ibid.*

This blurring of the lines of political accountability between the state and federal governments will occur regardless of whether the federal commandeering reduces a State's option to two unpalatable choices or not. It will result as long as, in some cases, federal law requires States to retain and unforce unpopular policies against the States' will.

2. Prohibiting States From Repealing Their Own Laws Raises Particular Concerns Under The Tenth Amendment.

The Third Circuit's *en banc* decision raises

further federalism concerns because it would prohibit States from doing so much as repealing their own laws. In 2013, the Third Circuit purported to interpret PASPA to preserve state autonomy at least to the extent that a State would be permitted to "repeal[] its ban on sports wagering." Pet. App. 158a, 160a. While this test was similarly unmoored to this Court's anti-commandeering case law, it at least preserved some room for States to remove existing restrictions on private conduct. The *en banc* Third Circuit, however, further restricted the universe of permissible state action by holding that PASPA prohibited even the "selective repeal of certain prohibitions" under state law. See Pet. App. 23a.

Prohibiting States from repealing their own laws raises at least two additional troubling concerns from a federalism perspective.

1. The Third Circuit's decision conflicts with a core aspect of residual sovereignty guaranteed by the Tenth Amendment—namely, the right of the People to decide whether or not to retain certain powers and liberties or to delegate those powers and liberties to the States. Specifically, the Third Circuit's ruling would make it impossible for the People, acting through their state representatives, to reclaim liberties previously delegated to the States through the repeal of unpopular laws.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, *or to the people*." U.S. Const. amend. X (emphasis added). This Amendment does not exist merely to "protect the

sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States." *New York*, 505 U.S. at 181. Instead, "the Constitution divides authority between federal and state governments for the *protection of individuals*." *Ibid.* (emphasis added); see also *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

Inherent in the rights reserved under the Tenth Amendment is the right of the People to decide whether or not to permit States to regulate in certain areas or to retain such power for themselves. The Tenth Amendment "does not specify which of these two possibilities obtains." *Thornton*, 514 U.S. at 847 (Thomas, J., dissenting). Rather, "the Amendment avoids taking any position on the division of power between the state governments and the people of the States," and leaves "to the people of each State to determine which 'reserved' powers their state government may exercise." *Id.* at 848. In other words, it is up to the People of each State and their elected representatives (not Congress) to decide whether to enact or repeal legislation in an area within the State's reserved powers (and not contrary to a valid federal regulatory regime).

Accordingly, this Court has noted that a federal law should be read narrowly to preserve state authority "when Congress legislates in an area traditionally governed by the States' police powers." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188–89 (2014). It is beyond doubt that the rights and obligations attending sports wagering fall within

these reserved or "police powers" of the States. Indeed, because "[t]he suppression of gambling is concededly within the police powers of a state, . . . legislation prohibiting it, or acts which may tend to facilitate it, will not be interfered with by the court[s] unless such legislation [effects] a clear, unmistakable infringement of rights secured by the fundamental law." *Ah Sin v. Wittman*, 198 U.S. 500, 505–06 (1905) (internal quotation marks omitted). The purpose of these canons of construction is to protect the primacy of state power in areas that the Constitution has left to the States. See *ibid.*

The Third Circuit's decision turns this deferential approach on its head, by restricting the rights of the States' elected representatives to return power to the People by repealing existing laws. Rather, the Third Circuit's decision would allow Congress to cement in place prohibitions that citizens have voted to remove from their state constitutions or statutes.

New Jersey's experience provides a case in point about how (absent PASPA) a State's citizenry can exercise its residual sovereignty under the U.S. Constitution to return liberties to the People within the State. Although New Jersey law had previously prohibited sports wagering, the state legislature in 2010 sought out ways in which it could financially assist struggling casinos and racetracks within its borders. See Pet. App. 52a. After public hearings convinced state lawmakers that sports wagering might provide a necessary boost to New Jersey's gaming establishments, the New Jersey Legislature provided its citizenry, via a 2011 constitutional

referendum, the opportunity to decide for itself whether the economic benefits of sports gaming outweighed the perceived drawbacks. *Ibid.* Sixty-four percent of those who voted decided that allowing sports gaming would be in the State's best interest. *Ibid.* The people of New Jersey thus by a comfortable majority returned a particular liberty that had previously been proscribed by state law (sports wagering) back to the People.

These actions fit squarely within the rights and powers reserved to the States and the People under the Tenth Amendment in instances where, like here, there is no contrary federal regulatory regime. The Third Circuit's construction of PASPA and its unprecedented approach to federal preemption, however, shackles New Jersey's citizenry by freezing in time prohibitions that no longer make sense to state residents.

Moreover, there is no principled reason why the Third Circuit's approach would be limited in future cases to the unique concerns underlying PASPA. Rather, the Third Circuit's reasoning throws into confusion the extent to which any state electorate may control its lawmakers' exercise of the police powers that have, since the earliest days of the Republic, enjoyed freedom from federal interference. The slope is slippery: if allowed to stand, the Third Circuit's opinion could place at the mercy of the federal government state attempts to experiment with their respective—and often uniquely local—approaches to, *inter alia*, the days on which alcohol might be sold, hunting and fishing licenses, lotteries, and speed limits. Certiorari should be granted to

protect the traditional role of the States in our federal system.

2. Furthermore, by allowing the federal government to ossify sports-wagering restrictions that the People of a State desire to repeal, the Third Circuit has allowed the federal government to commandeer executive branch officials as well as the State's lawmakers. As New Jersey's petition for certiorari notes, Pet. 17, the state constitution leaves law-enforcement officials with no discretion to ignore gambling prohibitions that remain in effect. See, *e.g.*, N.J. Const. art. V, § 1, ¶ 11 ("The Governor shall take care that the laws be faithfully executed."). Thus, the Third Circuit's opinion forces state law-enforcement officers to prosecute violators of prohibitions that, had the People been permitted to exercise their constitutionally-recognized right to self-governance, would not exist.

This Court has noted that federal commandeering of state executive-branch officials violates the Constitution as much as commandeering of legislative-branch officials. As the Court has observed, "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the . . . States." *Printz*, 521 U.S. at 922. The Court has also recognized that allowing Congress to commandeer state executive-branch officials would violate separation of powers principles. By allowing Congress to *de facto* order *state* executive branch officials to enforce *state* prohibitions in furtherance of a *federal* legislative anti-sports-gaming objective, the Third Circuit has

given Congress license to "act as effectively without the President as with him," *id.* at 923. This, in turn, has the deleterious effect of "shatter[ing]" federal "unity" and "reduc[ing]" the power of the Presidency. *Ibid.*

In short, "[t]he Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict." *Id.* at 919 (citing The Federalist No. 15). Thus, "the Federal Government may not compel the States to implement, by legislation *or executive action*, federal regulatory programs." *Id.* at 925 (emphasis added). Because the Third Circuit's reading of PASPA would require state executive officials to enforce unpopular laws that would otherwise be repealed, the court's analysis is fundamentally flawed and merits this Court's review.

II. THE THIRD CIRCUIT'S DECISION HARMS STATES AND OUR SYSTEM OF DUAL SOVEREIGNTY.

If permitted to stand, the Third Circuit's decision also threatens to greatly expand the federal government's power. Significantly, with the ability to shift political blame to the States, Congress could act with far less fear of repercussions at the voting booth, especially on issues that strike at the core of American life and for which the federal government would very likely want to avoid responsibility.

For instance, with the recent controversy over long-term brain damage in football players, Congress

could decide that American children should not be playing the sport. But rather than enact what could be extremely unpopular restrictions at the national level, the federal government could prohibit the States from authorizing or licensing youth football leagues. In the interest of national security, Congress might decide that the Department of Justice requires greater ability to monitor the Internet. But to deflect the backlash for its invasion of privacy, federal legislators could restrict the States from issuing business licenses to Internet service providers unless those companies agreed to provide the FBI unrestrained access to their subscriber databases.

In such cases, when the permit or license is denied, at least some (if not all) of the blame will fall wrongly on the States, even if a particular State would prefer as a matter of policy to have acted otherwise. Just as in *Printz*, it will be the State, or a state official, and "not some federal official" who is interfering with day-to-day life, 521 U.S. at 930. And just as in *Printz*, there would be legitimate concerns about misplaced blame even though these are high-profile issues and the relevant laws would be available to anyone diligent enough to seek them out and read them.

The injury to state sovereignty would be unprecedented. The genius of our system of dual sovereignty is that the States can act as a voice for change or dissent, even in the face of a national policy. Our system of government "promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose,

serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). If Congress disagrees and has the Article I authority to act, it may establish a federal regime and preempt contrary state law. And when Congress does so, it is understood that the federal government has simply overridden the States and that individual States do not necessarily agree with the national policy. But under the Third Circuit's view, Congress could avoid taking ownership and force the States to advance its preferred policy position, whatever that may be under the political party then in power, in a way that makes individual States seem responsible. Our federal system of government does not permit this result.

CONCLUSION

The petition for a writ of certiorari should be granted.

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